

Everest Natl. Ins. Co. v Quest Bldrs. Group, Inc.

2009 NY Slip Op 31834(U)

August 10, 2009

Supreme Court, New York County

Docket Number: 115164/08

Judge: Judith J. Gische

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SCANNED ON 8/17/2009
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
JUDITH J. GISCHE, J.S.C.

PART 10

Index Number : 115164/2008

EVEREST NATIONAL INSURANCE COMPANY

VS.

QUEST BUILDERS GROUP, INC.,

SEQUENCE NUMBER : # 001

COMPEL

Justice

INDEX NO. 115164-08

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

*motion (a) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.*

FILED
AUG 17 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/10/09

J. S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

Supreme Court of the State of New York
County of New York: IAS 10

-----X
Everest National Insurance Company,

Plaintiff,

Decision/Order

-against-

Index# 115164/08
Seq # 001

Quest Builders Group, Inc., Premium
Painting and Decorating and Delos
Insurance Co.

Defendants.
-----X

Hon. Judith J. Gische:

FILED
AUG 17 2009
COUNTY CLERK'S OFFICE
NEW YORK

Pursuant to CPLR §2219(a) the following numbered papers were considered by the court on this motion:

PAPERS	NUMBERED
Notice of Motion, MH affirm., exhibits.....	1
AO affirm in Opp., exhibits.....	2
Reply Affirm., exhibit.....	3

Upon the foregoing papers the decision and order of the court is as follows:

Defendant, Quest Builders Group, Inc. ("Quest") moves to compel plaintiff Everest National Insurance Company (sometimes "Everest") to accept and pay for its choice of counsel in a related personal injury/wrongful death action. Plaintiff opposes the motion and seeks to have this court place certain limits on Quest's right to select defense counsel of its own choosing, where there is a conflict of interest between the insured and insurer.

For the reasons set forth below, the court declines to place the limits urged by the plaintiff on Quest's right to select counsel in the personal injury action and grants the motion compelling plaintiff to accept counsel so chosen by Quest and to pay the

reasonable and necessary fees to defend Quest in the related action. The circumstances of this motion are as follows:

Quest is a general contractor. Plaintiff is an insurance company that issued a Comprehensive General Liability insurance to Quest under policy number 69F0000029-001 ("policy").

On August 13, 2006, an accident occurred at a construction site, in which a worker was injured and eventually died. In May 2007, a personal injury action was commenced in Supreme Court of the State of New York, Kings County (index # 15688/07), by Asya Vayner, the worker's surviving spouse, as administratrix of the estate ("personal injury action"). Vayner sued: Raymond Murray the owner of the property, Quest as the general contractor, Premium as the subcontractor and Delos Insurance Company as Premium's subcontractor.

In or about July 2007, Everest retained the law firm of White, Quinlan and Staley LLP to represent Quest in the personal injury action. Subsequently, after investigation, Everest disclaimed coverage to Quest and expressed its position that it will not indemnify or defend Quest in the personal injury action. In November 2008 Everest commenced the instant declaratory judgment action in which it seeks, among other relief, a declaration that it "is not and was not required to defend and/or to indemnify Quest in the [personal injury] action" (first cause of action).

Quest retained the law firm of Lawrence, Worden, Rains & Bard, P.C. ("Lawrence law firm") to defend it in this declaratory judgment action. It also notified Everest, in writing, that it was exercising its right to have its choice of counsel, the Lawrence law firm, take over its representation in the personal injury action. By letter

dated March 24, 2009 Everest acknowledged Quest's right to have independent counsel represent Quest in the personal injury action and its obligation to pay the reasonable and necessary fees for such counsel. It went on, however, to "decline [the] request" to have the Lawrence law firm represent Quest in the personal injury action because the firm was also representing Quest in this declaratory judgment action.

This motion ensued to compel substitution of counsel in the personal injury action to the Lawrence law firm and further compelling Everest to pay reasonable and necessary fees to defend Quest in that action. ¹

It is well established that when there is a conflict of interest between an insurer and an insured regarding the defense of an action brought by a third party, the insured has the right to select defense counsel of its own choosing and the insurer is liable for the payment of the reasonable value of the services provided by such attorneys.

Public Service Mut. Ins. Co. v. Goldfarb, 53 NY2d 392, 401 (1981); Prashker v. U.S. Guarantee Co., 1 NY2d 584, 593 (1956). At bar, the conflict between Quest, as insured, and Everest, as insurer, is readily apparent and even conceded by Everest. Everest has not only denied coverage under the policy for the incident that is the subject of the personal injury action, but it has commenced the instant declaratory judgment action for a ruling upholding its denial of coverage.

Everest concedes that Quest has the right to retain counsel of its own choosing

¹At oral argument the Court raised the issue of whether the motion should be heard in Kings County Supreme Court, where the personal injury action was pending. Counsel for both parties seemed to agree that either this court or the Kings County Supreme Court could decide the issue. No argument about this issue is raised by either party in their papers. Accordingly, this court will consider the merits of the parties' dispute.

to defend the personal injury action. It argues in this case, however, that the right to retain such counsel is not without restrictions and that the Lawrence law firm should not be able to defend Quest in this action and also the personal injury action at the same time.

The cases cited by plaintiff do not support its contention that there are restrictions on who Quest may hire to defend it, now that a conflict has arisen between it and Quest. The only limitation found in the case law is that the fees charged by the insured's selected counsel must be reasonable. In American Home Assurance Company v. Weissman, 79 AD2d 959 (1st dept. 1981), the issue was not the selection of counsel by the insured. Instead, the court granted summary judgment to the insured directing that the insurer had an obligation to defend. In so holding the court stated that the insurer was still entitled to control the defense of the action. At bar, however, the conflict is conceded and Everest has no right to control the defense of the action. Galasso, Langione & Botter, LLP v. Liotti, 22 Misc3d 450 (Sup. Ct. Nass. Co. 2008) also relied upon by plaintiff, is completely inapposite and does not involve an insured's right to choose counsel at all; it only addresses the parameters for determining the reasonableness of legal fees.

Even apart from the lack of legal precedent, Everest has not presented any plausible argument why this "dual representation" of Quest by the Lawrence law firm creates any real or potential conflict of interest. Everest argues that if the Lawrence law firm is retained in the personal injury action, it will still have to "report" to Everest. It conjectures that if the Lawrence law firm learns something in the personal injury action that is injurious to Quest's position in the declaratory judgment action, it would have

trouble reporting this information to Everest. This may in turn, according to Everest, affect its "settlement position".

As Quest points out, the arguments of Everest are an outgrowth of the underlying conflict of interest between Quest and Everest. Everest is only identifying that upon the substitution of counsel of Quest's choosing in the personal injury action, it will lose the ability to control the defense of the underlying personal injury action. It will lose that control, however, regardless of any dual representation by the Lawrence law firm in the declaratory judgment and personal injury actions.

Everest further argues that there has been no showing that the fees that will be incurred will be reasonable. Obviously it is premature to determine the reasonableness of fees not yet incurred. Both parties agree that fees are subject to a reasonableness standard. Should any dispute arise about the reasonableness of fees in the future, the court can easily resolve it. This is not a basis to deny the motion.

Accordingly the motion is granted and its is hereby:

ORDERED that the law firm of Lawrence, Worden, Rains & Bard, P.C. is substituted in the place of the law firm of White, Quinlan and Staley LLP as counsel for Quest Builders Group, Inc. in the action known as Asya Vayner, as Administratrix of the Estate of Lev Vayner, deceased v. Raymond Murray and Quest Builders Group, Inc. (Index # 15688/07) currently pending in the Supreme Court of the State of New York, Kings County, and it is further ordered

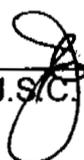
ORDERED that plaintiff, Everest National Insurance Company is directed to pay the law firm of Lawrence, Worden, Rains & Bard, P.C. the reasonable attorneys fees necessary to defend Quest Builders Group, Inc. in the action known as Asya Vayner, as

Administratrix of the Estate of Lev Vayner, deceased v. Raymond Murray and Quest Builders Group, Inc. (Index # 15688/07) currently pending in the Supreme Court of the State of New York, Kings County.

Any requested relief not otherwise expressly granted herein is denied. This constitutes the decision and order of the Court.

Dated: New York, NY
August 10, 2009

SO ORDERED:



J.G. J.S.C.

JUDITH J. GISCHE, J.S.C.

FILED
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